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IN THE
# Supreme Court of the United States
OCTOBER TERM, 1993

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ADVANCE CHEMICAL COMPANY, *et al.*,
*Petitioners,*

v.

UNITED STATES OF AMERICA,
*Respondent.*

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit**

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## BRIEF *AMICI CURIAE* OF NATIONAL ASSOCIATION OF MANUFACTURERS, CHEMICAL MANUFACTURERS ASSOCIATION, ELECTRONIC INDUSTRIES ASSOCIATION, AND THE CHAMBER OF COMMERCE OF THE UNITED STATES IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS


| | Page |
|---|---|
| TABLE OF AUTHORITIES | ii |
| INTEREST OF *AMICI CURIAE* | 1 |
| SUMMARY OF ARGUMENT | 3 |
| BACKGROUND | 3 |
| ARGUMENT | 5 |
| I. THE SUPERFUND PROGRAM SUFFERS FROM SUBSTANTIAL WASTE AND MISMANAGEMENT. THE DECISION BELOW WILL EXACERBATE THOSE PROBLEMS BY INSULATING ABUSES FROM JUDICIAL REVIEW | 5 |
| II. THE SUPERFUND PROGRAM IS ENORMOUSLY EXPENSIVE, AND ITS COSTS WILL BE SUBSTANTIALLY AND UNNECESSARILY INCREASED BY THE DECISION BELOW | 13 |
| CONCLUSION | 20 |

TABLE OF AUTHORITIES

Cases — Page

*Mathews v. Eldridge*, 424 U.S. 319 (1976) ..... 12
*Lone Pine Steering Committee v. U.S. Environmental Protection Agency*, 777 F.2d 882 (3d Cir. 1985), *cert. denied*, 476 U.S. 1115 (1986) ..... 5, 19

Statutes and Regulations

Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. §§ 9601-9675 ..... 3
42 U.S.C. § 9607 ..... 4
42 U.S.C. § 9613(h) ..... 4, 12
40 C.F.R. Part 300 (1992) ..... 4

Legislative Materials

*EPA: Contract Mismanagement*, Hearings before the Subcommittee of Oversight and Investigations, Committee on Energy and Commerce, U.S. House of Representatives, 102d Cong., 2d Sess. (1992) ..... 6
General Accounting Office, *Superfund: Actions Needed to Correct Long-standing Contract Management Problems*, Testimony of J. Dexter Peach, Assistant Comptroller General, before the Subcommittee on Oversight and Investigations, Committee on Energy and Commerce, U.S. House of Representatives, GAO/T-RCED-92-78 (July 8, 1992) ..... 6, 7, 8, 10, 11
General Accounting Office, *Unallowable and Questionable Indirect Costs Claimed by CH2M Hill*, Statement of J. Dexter Peach, Assistant Comptroller General, before the Subcommittee on Oversight and Investigations, Committee on Energy and Commerce, U.S. House of Representatives, GAO/T-RCED-92-37 (March 19, 1992) ..... 6, 7

TABLE OF AUTHORITIES—Continued

Page

General Accounting Office, *Superfund: Issues that Need to be Addressed Before the Program's Next Reauthorization*, Testimony of Peter Guerrero, Associate Director, before the Subcommittee on Investigations and Oversight, Committee on Public Works and Transportation, U.S. House of Representatives, GAO/T-RCED-92-15 (October 29, 1991) ..... 7, 15, 16

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General Accounting Office, *Superfund Contracts: EPA Needs to Control Contractor Costs*, Report to the Chairman, Subcommittee on Oversight and Investigations, Committee on Energy and Commerce, U.S. House of Representatives, GAO/RCED-88-182 (July 1988) ..... 7

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TABLE OF AUTHORITIES—Continued

Page

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Statement of Jan Acton, Assistant Director, Congressional Budget Office, before the Subcommittee on Oversight, Committee on Ways and Means, U.S. House of Representatives (June 11, 1992) .. 14

Statement of Carol Browner, Administrator, EPA, before the Subcommittee on Oversight and Investigations, Committee on Energy and Commerce, U.S. House of Representatives (March 10, 1993) ..... 10

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Regulatory Materials

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Agency Publications

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TABLE OF AUTHORITIES—Continued


| Articles | Page |
|---|---|
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| D. Blum, *91 Colleges May Be Required to Help Pay for Cleanup of 2 Hazardous-Waste Sites*, The Chronicle of Higher Education (June 10, 1992) at A25 | 18 |
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| R. Fuhrman and D. Hird, *EPA Proposed Rule on Superfund Cost Recovery: Streamlining or Steamrolling?*, 7 Toxics L. Rep. 450 (September 9, 1992) | 6, 9, 11 |
| P. Hong, *The Toxic Mess Called Superfund*, Business Week (May 11, 1992) at 32 | 6, 14, 18 |
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| C. Roush, *The Hurricane Called Superfund*, Business Week (August 2, 1993) at 74 | 13 |
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| *Congress Cuts Superfund Budget Request, Sets Spending at $1.57-Billion*, Inside EPA's Superfund Report (October 7, 1992) at 3 | 9 |
| *Dingell Says Superfund is "Defective," Calls for Change*, Inside EPA's Superfund Report (April 7, 1993) at 12 | 8 |
| *Lawmaker Says Program Will Go Unfunded Unless Changes Are Made*, Inside EPA's Superfund Report (July 28, 1993) at 7 | 9, 10 |

TABLE OF AUTHORITIES—Continued

Page

*Senate Appropriations Committee Targets Superfund During Hearing*, Inside EPA's Superfund Report (May 5, 1993) at 9 ..... 8
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S. Sarason, *Comment*, in U.S. Waste Management Policies (American Council for Capital Formation 1992) ..... 17
Hazardous Waste Cleanup Project (July 1992) .... 16
Hazardous Waste Cleanup Project, *Superfund Overview* ..... 14, 16, 17
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Superfund Improvement Project, *Superfund Reform: Achieving Faster Cleanup at a Fairer Price* (1993) ..... 18
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Superfund Issues Forum, *Superfund Liability: Myths and Facts About PRPs* (June 1991) ..... 19
Superfund Issues Forum, *What is Superfund* ..... 18

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## BRIEF *AMICI CURIAE* OF NATIONAL ASSOCIATION OF MANUFACTURERS, CHEMICAL MANUFACTURERS ASSOCIATION, ELECTRONIC INDUSTRIES ASSOCIATION, AND THE CHAMBER OF COMMERCE OF THE UNITED STATES IN SUPPORT OF PETITIONERS

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### INTEREST OF *AMICI CURIAE*

The National Association of Manufacturers (NAM), the Chemical Manufacturers Association (CMA), the Electronic Industries Association (EIA), and The Chamber of Commerce of the United States (Chamber) file this brief as *amici curiae* in support of petitioners, by written consent of all of the parties, pursuant to Rule 37.2 of the Rules of this Court. *Amici* are business groups whose members will be directly and adversely af-

fected by the decision below. That decision precludes judicial review of a wide range of the EPA's cleanup costs at Superfund sites—including unreasonable, inappropriate, and even illegal costs. In addition to depriving *amici*'s members (and thousands of others) of their statutory right to judicial review, the decision below destroys incentives for the EPA to manage effectively the enormously costly Superfund program and to reduce the mismanagement, waste and abuse that have characterized that program since its inception.

NAM, a nonprofit trade association, is the largest national trade association for the manufacturing sector. NAM's membership consists of approximately 12,000 companies and subsidiaries, covering the full spectrum of manufacturing industries, and ranging in size from very large companies to numerous small businesses. NAM's members employ approximately 85% of all manufacturing workers and produce over 80% of the manufactured goods in the United States.

CMA, a nonprofit trade association, is the largest national trade association for the chemical industry. CMA's approximately 180 members are responsible for more than 90% of the productive capacity for basic industrial chemicals in the United States.

EIA, a nonprofit trade association, is the oldest and largest trade association for the electronics industry, with more than 1,000 member companies that design, manufacture, distribute and sell electronic parts, components, equipment and systems for consumer, commercial, industrial, military and space use.

The Chamber is the nation's largest federation of business, trade and professional organizations. The Chamber represents more than 215,000 companies, as well as several thousand state and local chambers of commerce. Its membership, which includes companies of all types and sizes, reflects a diverse cross-section of American industry. The Chamber regularly advocates the interests of its mem-

bers in court on environmental issues of national concern to the business community.

Many of *amici*'s members are potentially responsible parties at one or more Superfund sites.

## SUMMARY OF ARGUMENT[1]

The decision below precludes judicial review of unreasonable and improper EPA Superfund cleanup costs if they were incurred pursuant to a general cleanup plan that is consistent with the National Contingency Plan. The decision is contrary to statutory language and common sense. It destroys any incentive for EPA to manage effectively the Superfund program and will make a program that is already badly managed even more subject to abuse (Point I). It will also substantially—and unnecessarily—add to the already staggering costs of the Superfund program (Point II).

*Amici*'s members are potentially responsible parties at numerous Superfund sites around the country. *Amici* are concerned that the Tenth Circuit's decision will have a severe negative impact on EPA's management of the Superfund program. Accordingly, *amici* respectfully urge the Court to grant the Petition.

## BACKGROUND

The Superfund program[2] provides for government cleanup of those contaminated sites determined by EPA to pose sufficient risk to human health and the environ-

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[1] *Amici* adopt the legal arguments advanced by petitioners in their Petition for a Writ of *Certiorari* (the Petition), and respectfully submit this brief to bring to the Court's attention certain factual matters that highlight the importance of this case —both to *amici*'s members and to the nation as a whole—and justify this Court's exercise of its discretionary jurisdiction.

[2] *See* Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. §§ 9601-9675, generally referred to as CERCLA or Superfund.

ment to be placed on the National Priorities List (NPL). Sites on the NPL are eligible for direct federal cleanup, with the government recovering its costs from "potentially responsible parties" (PRPs).[3]

For NPL sites where EPA conducts the cleanup, EPA develops a proposed cleanup or "response" plan, which must be consistent with the National Contingency Plan (NCP)—EPA's regulations governing the cleanup of Superfund sites.[4] The typical response plan is necessarily conceptual in nature, describing in general terms the type of cleanup that will be undertaken. The government then directs contractors to implement an operational cleanup plan, and seeks reimbursement of the cleanup costs incurred from the PRPs through a cost recovery action. EPA views PRPs as strictly, jointly and severally liable for such cleanup costs, even though their actions giving rise to liability may have been legal and prudent when taken.

PRPs—including *amici*'s members—consider the prospect of judicial review of EPA's cleanup costs to be an extremely important incentive for keeping EPA's actions reasonable and consistent with the NCP. Unfortunately, the opportunity for judicial review has been limited to date because of the rule against pre-enforcement review—*i.e.*, a PRP cannot challenge either the selection of the overall response plan, or the actual cleanup actions taken pursuant to it, before EPA seeks to recover costs from the PRP in the cost recovery action.[5] Coupled with this ban

[3] PRPs are those persons described in 42 U.S.C. § 9607.

[4] *See* 40 C.F.R. Part 300 (1992).

[5] At EPA's request, Congress explicitly added a ban on pre-enforcement review to CERCLA in 1986. *See* 42 U.S.C. § 9613(h). As noted in the Petition, in urging the adoption of these amendments to CERCLA, the Justice Department represented that cleanup costs would be reviewable during the judicial review that was still permitted by the statute. *See* Petition at 9-10. Similarly, in ruling that there was no pre-enforcement review even before CERCLA

on pre-enforcement review, the decision below immunizes many of EPA's cleanup actions from judicial review and destroys an important incentive for EPA to correct the problems that have plagued the Superfund program.

## ARGUMENT

### I. THE SUPERFUND PROGRAM SUFFERS FROM SUBSTANTIAL WASTE AND MISMANAGEMENT. THE DECISION BELOW WILL EXACERBATE THOSE PROBLEMS BY INSULATING ABUSES FROM JUDICIAL REVIEW.

The Superfund program has been riddled with waste and mismanagement (Point A). To date, the ban on pre-enforcement review has shielded these abuses from judicial scrutiny. Now that more Superfund sites have progressed through enforcement and are ripe for judicial review, PRPs had hoped that such review would lead EPA to improve its performance in the future. The decision below will prevent this beneficial result of judicial review and will exacerbate the mismanagement that has plagued the Superfund program (Point B).

#### A.

Superfund is an enormously troubled program. It has suffered from pervasive mismanagement; inappropriate and excessive costs; exorbitant markups of as much as 300%

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was amended, the Third Circuit explicitly "recognize[d] the importance of judicial review of agency action," but concluded that such review should occur in the cost recovery proceeding:

> The reimbursement trial will not be a pro forma proceeding but will permit presentation of adequate evidence for careful and exacting scrutiny by the court. The statute requires the EPA to observe cost effectiveness, and that mandate is a limitation, not a license to squander.

*Lone Pine Steering Committee v. U.S. Environmental Protection Agency*, 777 F.2d 882, 887-88 (3d Cir. 1985), *cert. denied*, 476 U.S. 1115 (1986). The decision below precludes the judicial review that both the Justice Department and the Third Circuit pointed to as justifying the ban on pre-enforcement review.

to 400% or more; overcharges and cost overruns; unnecessary, inefficient, duplicative and low quality work; double billing; and outright fraud. As a result, "Superfund contractors have spent at twice the anticipated rate, and have accomplished less than one-half the anticipated progress at Superfund cleanup sites." [6]

There has been widespread publicity of improper uses of Superfund money—expenditures on parties, beach house rentals, tickets for sporting events, fishing licenses, dancing lessons, costume rentals, potted plants, phone calls to sex-lines, and the like.[7] While these abuses have received much of the attention, they are only symptomatic of much greater problems in the program, problems that have been documented by Congress, the General Accounting Office (GAO), the Office of Technology Assessment (OTA), numerous nongovernmental organizations, and EPA itself.

GAO has been a frequent critic of Superfund,[8] decrying "EPA's chronic Superfund contract management prob-

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[6] *EPA: Contract Mismanagement*, Hearings before the Subcommittee on Oversight and Investigations, Committee on Energy and Commerce, U.S. House of Representatives, 102d Cong., 2d Sess. (1992) [hereinafter, *"EPA Contract Mismanagement"*] at 326 (statement of Congressman Dingell).

[7] *See, e.g.*, GAO, *Actions Needed, infra* note 8, at 4; GAO, *Unallowable and Questionable Costs, infra* note 8, at 7; R. Fuhrman and D. Hird, *EPA Proposed Rule on Superfund Cost Recovery: Streamlining or Streamrolling?*, 7 Toxics Law Reporter (BNA) 450, 451 (Sept. 9, 1992); P. Hong, *The Toxic Mess Called Superfund*, Business Week (May 11, 1992) at 32; *Firm's EPA Bills "Outrageous"*, USA Today (March 19, 1992) at 1; A. Light, *CERCLA Law and Procedure* 57 (1991).

[8] "[T]he GAO has issued twenty-eight reports calling for improvement of the Superfund's contract management." E. Koningsberg, *Waste Watchers*, The New Republic (April 5, 1993) at 12. *See, e.g.*, GAO, *Superfund: Actions Needed to Correct Longstanding Contract Management Problems*, Testimony of J. Dexter Peach, Assistant Comptroller General, before the Subcommittee on Over-

lems," [9] and concluding that "EPA has not sufficiently monitored, controlled, and challenged contractor expenditures." [10] Among the problems found by GAO are: unallowable and questionable contractor costs; inadequate

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sight and Investigations, Committee on Energy and Commerce, U.S. House of Representatives, GAO/T-RCED-92-78 (July 8, 1992) [hereinafter, "GAO, *Actions Needed*"]; GAO, *Unallowable and Questionable Indirect Costs Claimed by CH2M Hill* [one of Superfund's largest contractors], Statement of J. Dexter Peach, Assistant Comptroller General, before the Subcommittee on Oversight and Investigations, Committee on Energy and Commerce, U.S. House of Representatives, GAO/T-RCED-92-37 (March 19, 1992) [hereinafter, "GAO, *Unallowable and Questionable Costs*"]; GAO, *Superfund: Issues that Need to be Addressed Before the Program's Next Reauthorization*, Testimony of Peter Guerrero, Associate Director, before the Subcommittee on Investigations and Oversight, Committee on Public Works and Transportation, U.S. House of Representatives, GAO/T-RCED-92-15 (Oct. 29, 1991) [hereinafter, "GAO, *Issues that Need to be Addressed*"]; GAO, *Superfund: EPA Has Not Corrected Long-standing Contract Management Problems*, Report to Congress, GAO/RCED-92-45 (Oct. 1991) [hereinafter, "GAO, *Long-standing Management Problems*"]; GAO, *Making Superfund Work Better: A Challenge for the New Administration*, Testimony of Richard Hembra, Director, before the Subcommittee on Superfund, Ocean and Water Protection, Committee on Environment and Public Works, U.S. Senate, GAO/T-RCED-89-48 (June 15, 1989) [hereinafter, "GAO, *Making Superfund Work Better*"]; GAO, *Sound Contract Management Needed at the Environmental Protection Agency*, Statement of Richard L. Hembra, Associate Director, before the Subcommittee on Civil Service, Committee on Post Office and Civil Service, U.S. House of Representatives, GAO/T-RCED-89-8 (Feb. 23, 1989) [hereinafter, "GAO, *Sound Contract Management Needed*"]; GAO, *Superfund Contracts: EPA Needs to Control Contractor Costs*, Report to the Chairman, Subcommittee on Oversight and Investigations, Committee on Energy and Commerce, U.S. House of Representatives, GAO/RCED-88-182 (July 1988) [hereinafter, "GAO, *Contractor Costs*"]; GAO, *Superfund: Improvements Needed in Work Force Management*, Report to Congress, GAO/RCED-88-1 (Oct. 1987) [hereinafter, "GAO, *Improvements Needed*"].

[9] GAO, *Actions Needed, supra* note 8, at 6.

[10] GAO, *Contractor Costs, supra* note 8, at 2.

contractor cost controls; inadequate audit coverage and audit follow-up; excessive program management costs; and contractor conflicts of interest.[11]

As a result, GAO has identified Superfund as one of the federal programs most vulnerable to fraud, waste and abuse,[12] and has concluded that "the nation has not been getting a fair return on its large investment in Superfund."[13]

OTA has also been critical of Superfund, concluding that "it is not uncommon for the government to spend from 100 to 500 percent more than a private client would" for the same work.[14] OTA has estimated that as much as "50 [to] 70 percent of current Superfund program spending is inefficient," [15] and has warned against "[s]imply pouring more money into Superfund" without improving EPA's management.[16]

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[11] *See* GAO reports cited *supra* in note 8.

[12] GAO, *Actions Needed, supra* note 8, at 1. GAO noted that the program is vulnerable "in part because of its extensive use of cost-reimbursable contracts . . . and its history of contract management problems." *Id.*

[13] GAO, *Making Superfund Work Better, supra* note 8, at 1.

[14] OTA, *Assessing Contractor Use in Superfund—A Background Paper*, OTA-BP-ITE-51 (Jan. 1989) [hereinafter, "OTA, *Assessing Contractor Use*"] at 7. The Congressional Budget Office has also concluded that "[t]he Superfund program has . . . presented unexpected administrative difficulties." Statement of Jan Acton, Assistant Director, Congressional Budget Office, before the Subcommittee on Investigations and Oversight, Committee on Public Works and Transportation, U.S. House of Representatives (Oct. 29, 1991) [hereinafter, "Acton Statement"] at 25.

[15] OTA, *Coming Clean: Superfund Problems Can Be Solved*, OTA-ITE-433 (Oct. 1989) [hereinafter, "OTA, *Coming Clean*"] at 28.

[16] OTA, *Assessing Contractor Use, supra* note 14, at 7.

Congress, too, has joined in the criticism. *See, e.g., Senate Appropriations Committee Targets Superfund During Hearing*, Inside EPA's Superfund Report (May 5, 1993) at 9; *Dingell Says Super-*

And EPA itself has admitted serious problems with the Superfund program. For example, EPA's Inspector General recently testified to Congress that:

> In each of our annual reports over the last ten years we have reported pervasive problems with fundamental aspects of sound financial management in the Superfund program.[17]

The Inspector General concluded that "sound financial management was a secondary, or lower, priority during the decade."[18] And an EPA task force concluded that "EPA is not conducting effective contract administration and oversight."[19]

EPA's current Administrator, Carol Browner, was more blunt:

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*fund is "Defective," Calls for Change*, Inside EPA's Superfund Report (April 7, 1993) at 12; *Superfund gets Wallop's Red Tape Award*, Superfund Week (March 12, 1993) at 6; *Congress Cuts Superfund Budget Request, Sets Spending at $1.57-Billion*, Inside EPA's Superfund Report (Oct. 7, 1992) at 3; R. Fuhrman and D. Hird, *EPA Proposed Rule on Superfund Cost Recovery: Streamlining or Steamrolling?*, 7 Toxics L. Rep. (BNA) 450, 451 (Sept. 9, 1992) ("In light of these abuses, Congress repeatedly has stressed the need for EPA to put its house in order. . . .").

[17] Testimony reported in *Lawmaker Says Program Will Go Unfunded Unless Changes Are Made*, Inside EPA's Superfund Report (July 28, 1993) at 7. The Inspector General referred to problems with accounting involving preliminary site costs; recording costs for equipment and property; and a lack of effective controls in the accounting system which led to errors in Superfund financial records amounting to $500 million. *Id.*

[18] *Id.*

[19] EPA, *Implementation of the Superfund Alternative Remedial Contracting Strategy*, OSWER dir. 9201.0-01 (1991) at 3. This is hardly surprising given that many Superfund project managers told GAO they do not consistently review invoices because they have difficulty understanding them due to lack of training. GAO, *Long-standing Management Problems, supra* note 8, at 26-27.

> I am appalled by what I have learned about EPA's total lack of management, accountability and discipline.[20]

Administrator Browner testified that EPA's "serious violations of proper management practices" have resulted in an "intolerable waste of taxpayers' money." [21]

* * * *

The effectiveness and efficiency of the Superfund program depend on EPA's management and oversight of the contractors who actually do the cleanups.[22] As GAO has stated, "EPA's extensive use of cost-reimbursable contracts in the Superfund program imposes on it a special responsibility for effective cost control." [23] Unfortunately, as the authorities cited above establish, all too often proper EPA management and oversight has been lacking.

And, while EPA has repeatedly committed to improving its management of the Superfund program, it has

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[20] *Quoted in EPA is a mess, its chief says*, The Boston Globe (March 11, 1993) at 17. *See also* remarks of EPA's Deputy Administrator that the Superfund program "is very much flawed," *quoted in Lawmaker Says Program Will Go Unfunded Unless Changes Are Made*, Inside EPA's Superfund Report (July 28, 1993) at 7.

[21] Statement of Carol Browner, Administrator, EPA, before the Subcommittee on Oversight and Investigations, Committee on Energy and Commerce, U.S. House of Representatives (March 10, 1993) at 1.

[22] *See, e.g.*, GAO, *Actions Needed, supra* note 8, at 2 ("efficient use of Superfund resources, including contracting resources, is critical to the program's ultimate success"); OTA, *Assessing Contractor Use, supra* note 14, at 1-2.

[23] GAO, *Actions Needed, supra* note 8, at 8. This is especially true given the warning from EPA's Inspector General that "Superfund is particularly sensitive to fraud, waste and abuse." EPA, Office of Inspector General, *Annual Superfund Report to the Congress for Fiscal 1987* (Sept. 1988), foreword.

consistently failed to do so.[24] Moreover, EPA's actions speak louder than its words—instead of improving management and oversight of Superfund, what EPA has in fact done in response to this overwhelming evidence of mismanagement is to propose a rule that will make it harder to uncover such abuses by reducing the amount of documentation EPA must provide to support its cost recovery claims.[25]

**B.**

The prospect of judicial review is an important incentive for the proper management of any government program. Unfortunately, judicial review of EPA's Superfund cleanup actions has thus far been largely precluded by the ban on pre-enforcement review—with the resulting waste and mismanagement detailed above.

Now, the Tenth Circuit has gone one step further, and held that even after enforcement PRPs cannot challenge the actual cleanup costs; rather they can only challenge the consistency of the overall conceptual response plan with the NCP. The effect of this ruling is that if the overall response plan is consistent with the NCP, PRPs cannot challenge the actual cleanup costs incurred

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[24] *See, e.g.*, GAO, *Actions Needed*, *supra* note 8, at 1 ("EPA ha[s] not fully addressed numerous GAO recommendations to reduce the Superfund program's vulnerability to fraud, waste and abuse—despite several years of our reporting on these deficiencies"); *id.* at 6 ("A pattern is apparent in EPA's response to reported contract management deficiencies: extended study of the problems, sometimes leading to revised plans or procedures, but with insufficient follow-through to actually correct the problems.").

[25] *See Recovery of Costs for CERCLA Response Actions*, 57 Fed. Reg. 34742, 34749-51 (Aug. 6, 1992). *See generally* R. Fuhrman and D. Bird, *EPA Proposed Rule on Superfund Cost Recovery: Streamlining or Steamrolling?*, 7 Toxics L. Rep. (BNA) 450, 452 (Sept. 9, 1992). In that same proposal, EPA also proposes a rule identical to the decision below, which would insulate from judicial review even those excessive and unreasonable costs which could still be discovered under the reduced documentation requirements. *See* 57 Fed. Reg. at 34744.

pursuant to that plan—no matter how unreasonable or inappropriate those costs may be.

Such a result is bad policy and bad government (and grossly unfair to the PRPs who, in addition to being held strictly liable for actions that may have been perfectly legal when taken, will now have the added burden of paying for inappropriate and unnecessary costs). Such a rule should not be adopted by the courts absent the clearest evidence of Congress' intent to insulate such government actions from judicial review—evidence that simply does not exist. Indeed, given Congress' extensive criticism of EPA's management of the Superfund program, discussed above, it is difficult to believe Congress could have intended any such result.[26]

* * * *

The Superfund program has matured to the point where EPA's cleanup actions were finally going to be subject to judicial scrutiny. Consequently, there could hardly be a worse time for the courts to abdicate their responsibility to ensure that EPA's management of the Superfund program complies with the law. Yet that is precisely what the decision below does. Coupled with the ban on pre-enforcement review, the decision below immunizes a wide range of EPA's cleanup actions—including improper, excessive, and even illegal expenditures—from any judicial review whatsoever. If allowed to stand, the Tenth Circuit's decision can only serve to magnify the problems that have plagued Superfund to date. It is for this reason that *amici* find that decision so troubling.

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[26] As noted above (*supra* note 5), when Congress wants to limit judicial review it knows how to do so explicitly, as it did in prohibiting pre-enforcement review. *See* 42 U.S.C. § 9613(h). There is no such indication of congressional intent to prevent review of EPA's cleanup costs in cost recovery actions.

Moreover, a rule holding private parties responsible for costs they cannot challenge the appropriateness or legality of would raise serious constitutional issues. *See, e.g., Mathews v. Eldridge*, 424 U.S. 319, 333 (1976).

## II. THE SUPERFUND PROGRAM IS ENORMOUSLY EXPENSIVE, AND ITS COSTS WILL BE SUBSTANTIALLY AND UNNECESSARILY INCREASED BY THE DECISION BELOW.

It is not just the evidence of mismanagement in the Superfund program—waste that may be forever shielded from judicial review by the decision below—that makes that decision so troubling. The other factor that makes this case sufficiently important to merit this Court's review is the magnitude of the resources at stake.

By any measure, the cost of cleaning up contaminated sites in this country will be staggering. Some current projections of the overall cleanup costs exceed $1 *trillion*,[27] or more than double the entire amount of the recently

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[27] *See, e.g.*, C. Roush, *The Hurricane Called Superfund*, Business Week (Aug. 2, 1993) at 74 ($1 trillion over next 50 years); F. Viviano, *How Superfund Became a Mess*, The San Francisco Chronicle (May 30, 1991) at A1 ($1 trillion over next 30 years); M. Russell, *Wasteful Waste Disposal*, The Washington Post (March 20, 1992) at A25 ($750 billion to over $1 trillion). Certain other projections are not quite as high, *see, e.g.*, B. Feder, *In the Clutches of the Superfund Mess*, The New York Times (June 16, 1991), section 3 at 6 ($750 billion), while others are even higher. *See, e.g.*, R. Abramson, *The Superfund Cleanup: Mired in Its Own Mess*, Los Angeles Times (May 10, 1993) at A1 (above $1 trillion).

In a study published in December 1991, the Waste Management Research and Education Institute of the University of Tennessee provides the following estimates of cleanup costs: under current policy, the "best guess" is $752 billion, with a "plausible lower bound" of $478 billion and a "plausible upper bound" of $1.046 trillion; under potentially less stringent cleanup criteria, the numbers drop to $484 billion, $373 billion, and $691 billion, respectively; and under potentially more stringent cleanup criteria, the best guess jumps to $1.177 trillion, with plausible lower and upper bounds of $966 billion and $1.694 trillion. *See M.* Russell. E. Colglazier, and M. English, *Hazardous Waste Remediation: The Task Ahead* (Knoxville, Tenn.: Waste Management Research and Education Institute, University of Tennessee, Dec. 1991) [hereinafter, "Russell, *The Task Ahead*"] Table I at 16, Table II at 19, Table III at 22.

enacted deficit reduction plan. And, the projections have been increasing steadily—indeed, dramatically.[28]

Estimates of the overall cost of the Superfund program have also been rising rapidly. When Superfund was established in 1980, it was expected to clean up about 400 sites over a five year period at a projected cost in the low billions of dollars.[29] Cleanup of the average site was expected to cost under $10 million.[30] Each of these estimates has grown explosively.

The number of sites identified for potential inclusion on the NPL has increased from thousands to tens of thousands,[31] and is projected to increase considerably more.[32]

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[28] For example, OTA's estimate increased from $300 billion in 1985 to over $500 billion in 1989. *See* OTA, *Assessing Contractor Use, supra*, note 14, at 1.

[29] *See, e.g.*, O. Kramer and R. Briffault, *Cleaning Up Hazardous Waste: Is There A Better Way?* (Jan. 1993) [hereinafter, "Kramer, *Is There A Better Way?*"] at 23 (Congress anticipated about 400 sites when it enacted Superfund); Statement of William Reilly, Administrator, EPA, before the Committee on Environment and Public Works, U.S. Senate (June 15, 1989) [hereinafter, "Reilly Statement"] at 3 (expected a few hundred sites); F. Viviano, *Superfund Costs May Top S&L Bailout*, The San Francisco Chronicle (May 29, 1991) at A1 (expected cost of less than $5 billion).

[30] *See, e.g.*, Hazardous Waste Cleanup Project, *Superfund Overview* at 3.

[31] *See, e.g.*, EPA, *Cleaning Up the Nation's Waste Sites: Markets and Technology Trends*, EPA 542-R-92-012 (April 1993) [hereinafter, "EPA, *Cleaning Up*"] at 3 (as of September 1992, 36,814 sites in EPA's database of potential Superfund sites); Acton Statement, *supra* note 14, at 14-15 (as of June 1991, 34,652 sites in database—up from 31,932 in June 1989); D. Stipp, *Super Waste?*, The Wall Street Journal (May 15, 1991) at 1; P. Hong, *The Toxic Mess Called Superfund*, Business Week (May 11, 1992) at 32.

[32] *See, e.g.*, Statement of Jan Acton, Assistant Director, Congressional Budget Office, before the Subcommittee on Oversight, Committee on Ways and Means, U.S. House of Representatives

The NPL has grown from about 115 sites initially,[33] to over 1,200 today,[34] and will increase by 50 to 100 sites per year for at least the next several years.[35] The NPL will grow to at least 2,000 sites.[36] Some expect it to reach 3,000, 4,000, or even 6,000 sites,[37] and others expect it to go even higher.[38] GAO has warned that Superfund "may be overwhelmed by the number of sites that EPA projects may be added to the program in the future." [39]

The increase in the estimated average cleanup cost per site has been equally dramatic. Early estimates were

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(June 11, 1992) at 30 (EPA estimates its database will increase to 90,000 potential sites); Russell, *The Task Ahead, supra* note 27, at A-3.13 (estimates database will increase to 75,000 sites); OTA, *Coming Clean, supra* note 15, at 98 (database growing by 2,000 sites per year; "[a]n active site discovery program . . . could at least double the rate of growth"). Moreover, there are hundreds of thousands of additional potential sites. *See infra* note 50.

[33] *See, e.g.*, GAO, *Improvements Needed, supra* note 8, at 11.

[34] *See, e.g.*, EPA, *Cleaning Up, supra* note 31, at 3.

[35] *See, e.g.*, EPA, *Cleaning Up, supra* note 31, at 30; Reilly Statement, *supra* note 29, at 4 (75-100 sites/year).

[36] *See, e.g.*, EPA, *Cleaning Up, supra* note 31, at 30; Reilly Statement, *supra* note 29, at 4 (2,100 sites by year 2000).

[37] *See, e.g.*, Russell, *The Task Ahead, supra* note 27, at A-3.13 (describing 3,000 as "best guess" and 6,000 as "plausible upper bound"); R. Abramson, *The Superfund Cleanup: Mired in Its Own Mess*, Los Angeles Times (May 10, 1993) at A1 (4,000).

[38] *See, e.g.*, OTA, *Coming Clean, supra* note 15, at 11 (estimates NPL will grow to 10,000 sites or more); Kramer, *Is There A Better Way?, supra* note 29, at 32 (NPL may grow to 6,500 to 21,950 sites—or even 13,000 to 43,900 sites—based on GAO, OTA, and EPA data); Russell, *The Task Ahead, supra* note 27, at A-3.6 (reasonable projections for the NPL range from 2,000 to 10,000 sites); F. Viviano, *Superfund Costs May Top S&L Bailout*, The San Francisco Chronicle (May 29, 1991) at A1 (congressional and independent researchers believe NPL will exceed 10,000 sites).

[39] GAO, *Issues that Need to be Addressed, supra* note 8, at 1.

under $10 million,[40] and quickly grew to $20 million.[41] Current projections are at least $25-$30 million,[42] although estimates of $40-$60 million or more[43] are more likely accurate.

The estimate for the total Superfund cleanup cost has increased from several billion dollars,[44] to $40 billion,[45]

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[40] *See, e.g.*, OTA, *Coming Clean, supra* note 15, at 179 ($7 million).

[41] *See, e.g.*, Hazardous Waste Cleanup Project, *Superfund Overview* at 3 ($21 million).

[42] *See, e.g.*, Reilly Statement, *supra* note 29, at 4 (approaching $25 million, "and there is every reason to believe that this figure will increase"); Kramer, *Is There A Better Way?, supra* note 29, at 31 ($30 million a "very conservative" estimate); GAO, *Issues that Need to be Addressed, supra* note 8, at 4 ($25 million, "good reason to believe that these costs will rise"); EPA, *Cleaning Up, supra* note 31, at 3 ($27 million).

[43] "Private estimates place the likely cost at $45-$60 million per site." Hazardous Waste Cleanup Project, *Superfund Overview* at 3. *See also* Russell, *The Task Ahead, supra* note 27, Table I at 16, Table II at 19, Table III at 22 (average cost per site $50 million under current cleanup criteria; but range for average cost could be from $30 million under potentially less stringent cleanup criteria to $117 million under potentially more stringent cleanup criteria); F. Viviano, *Superfund Costs May Top S&L Bailout*, The San Francisco Chronicle (May 29, 1991) at A1 ($50 million); K. Probst and P. Portney, *Assessing Liability for Superfund Cleanups: An Analysis of Policy Options* (Resources for the Future 1992) [hereinafter, "Probst, *Policy Options*"] at 17 ($40 million).

The estimated time to complete the cleanup of these sites has also increased dramatically, from less than 10 years to more than 50. *See, e.g.*, OTA, *Assessing Contractor Use, supra* note 14, at 25 ("using the most conservative number of sites to be cleaned up of 2,000 and an optimistic pace of 30 cleanups per year, the Superfund program will be around for the next 60 years").

[44] *See, e.g.*, Hazardous Waste Cleanup Project (July 1992) at 6.

[45] *See, e.g.*, GAO, *Issues that Need to be Addressed, supra* note 8, at 4 ($40 billion); Probst, *Policy Options, supra* note 43, at 30 ($44.6 billion, not including sites to be added in the future).

to $60-75 billion,[46] to $100 billion,[47] to much higher figures.[48] It is now expected that "the final Superfund bill could be double that of the savings and loan debacle." [49] And, hovering in the background are several hundred thousand more potential sites.[50]

The mismanagement described above has contributed substantially to these astronomical costs, and "threaten[s] to make the [Superfund] program the most expensive pub-

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[46] *See, e.g.*, Kramer, *Is There A Better Way?*, *supra* note 29, at 31 ($76 billion based on EPA's figures, but describes those figures as "extremely conservative"); Hazardous Waste Cleanup Project, *Superfund Overview* at 3 ($60 billion).

[47] *See, e.g.*, Russell, *The Task Ahead*, *supra* note 27, Table I at 16 (calculates $106 billion as the plausible *lower* bound for NPL cleanups); S. Sarason, *Comment*, in U.S. Waste Management Policies (American Council for Capital Formation 1992) at 93 (more than $100 billion).

[48] *See, e.g.*, Russell, *The Task Ahead*, *supra* note 27, Table I at 16 ($151 billion as the "best guess" for NPL cleanups, and $302 billion as the "plausible upper bound"). In that same study, estimates for NPL cleanup costs under potentially more stringent criteria increase to a best guess of $352 billion, with a plausible lower bound of $246 billion and a plausible upper bound of $704 billion. *Id.* Table III at 22. *See also* F. Viviano, *Superfund Costs May Top S&L Bailout*, The San Francisco Chronicle (May 29, 1991) at A1 (up to $1 trillion, citing separate studies by Salomon Brothers and Hirschhorn and Associates).

[49] F. Viviano, *Superfund Costs May Top S&L Bailout*, The San Francisco Chronicle (May 29, 1991) at A1.

[50] These figures [on costs and time to clean up] are even more startling when you consider that the seriousness of contamination at up to several hundred thousand additional potential hazardous waste sites may need to be eventually addressed.

GAO, *Making Superfund Work Better*, *supra* note 8, at 1. *See also id.* at 9-10 ("In December 1987 we estimated that up to 425,000 sites nationwide may need to be evaluated for Superfund action."); OTA, *Coming Clean*, *supra* note 15, at 129 ("upper bound of at least 439,000 potential sites").

lic policy fiasco in U.S. history." [51] By destroying incentives for proper management, the Tenth Circuit's decision will only increase such costs.

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The impact of these staggering cleanup costs—and, therefore, of the decision below that will substantially and unnecessarily increase those costs—will be widespread. Over 25,000 individuals and entities have already been identified as PRPs at one or more Superfund sites,[52] and the number is sure to go much higher.[53] PRPs include not just large companies, but numerous small businesses; federal, state and local government entities; universities and public school systems; hospitals; religious institutions and charitable organizations; and private individuals.[54] "Collectively, PRPs cut across the

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[51] F. Viviano, *Superfund Costs May Top S&L Bailout*, The San Francisco Chronicle (May 29, 1991) at A1.

[52] *See, e.g.*, Kramer, *Is There a Better Way?*, *supra* note 29, at xiii (26,000 PRPs by end of 1992). As with virtually all aspects of the Superfund program (with the notable exception of the number of sites actually cleaned up), the number of PRPs has been increasing rapidly. By the end of 1989, EPA had identified 14,000 PRPs, *see, e.g.*, Superfund Issues Forum, *What is Superfund?* (1991) at 2, and a June 1991 article refers to 17,000 PRPs. *See* B. Feder, *In the Clutches of the Superfund Mess*, The New York Times (June 16, 1991), section 3 at 6.

[53] "[The] 26,000 PRPs . . . designated by EPA represent a small slice of the total pie." Kramer, *Is There A Better Way?*, *supra* note 29, at 150.

[54] *See, e.g.*, B. Feder, *In the Clutches of the Superfund Mess*, New York Times (June 16, 1991), section 3 at 1, 6; D. Blum, *91 Colleges May Be Required to Help Pay for Cleanup of 2 Hazardous-Waste Sites*, The Chronicle of Higher Education (June 10, 1992) at A25; P. Hong, *The Toxic Mess Called Superfund*, Business Week (May 11, 1992) at 32 (local Girl Scout troop), 34; National Environmental Trust Fund, *Superfund—An Environmental Failure* (Jan. 1993) at 2; Superfund Improvement Project, *Superfund Reform: Achieving Faster Cleanup at a Fairer Price* (1993) at 1; Superfund Issues Forum, *The National Environmental Trust Fund* (June 1991) at 3.

entire breadth of American organizations and enterprises." [55]

As one Member of Congress has said: "Superfund will ultimately make PRPs of us all." [56]

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*Amici*'s members are committed to protecting the public from environmental harm, including from contaminated waste sites. They understand that environmental cleanup will be costly, and are fully prepared to pay their fair share. However, this country cannot afford to increase the substantial costs of environmental cleanup by mismanagement, waste and abuse. It is critical that government plans for the cleanup of Superfund sites be properly selected, and that the costs incurred not be unreasonable, excessive or inappropriate.

The ban on pre-enforcement review has shielded abuses in the Superfund program from judicial scrutiny to date. The program is now reaching the stage where EPA's cleanup actions would finally be subject to the "careful and exacting study" promised in return for the ban on pre-enforcement review.[57] *Amici*'s members know firsthand that the prospect of such judicial review will be extremely important in reducing inappropriate and wasteful expenditures. By eliminating such review, the Tenth Circuit's decision destroys the incentive for responsible government action and can only increase the waste that has all too often characterized Superfund cleanups. Based on their daily involvement in the Superfund program, *amici*'s members know that, if allowed to stand, the

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[55] Kramer, *Is There A Better Way?*, *supra* note 29, at 150.

[56] *Quoted in* Superfund Issues Forum, *Superfund Liability: Myths and Facts About PRPs* (June 1991) at 1.

[57] *Lone Pine Steering Committee v. U.S. Environmental Protection Agency*, 777 F.2d 882, 887 (3d Cir. 1985), *cert. denied*, 476 U.S. 1115 (1986).

decision below will prove to be an extremely costly mistake.

## CONCLUSION

Superfund will continue to demand enormous national resources. Its success will depend on effective management and oversight. Given the overwhelming evidence of mismanagement, waste and abuse in the Superfund program to date, one would hope to see steps taken to *increase* effective oversight of that program. Unfortunately, the decision below moves in exactly the opposite direction. Far too much is at stake in the Superfund program to deprive the nation of the benefits of judicial review of EPA's actions.

For the foregoing reasons, *amici* respectfully urge the Court to grant the Petition for a Writ of *Certiorari*.

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